Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

No. 91-1052

In the Supreme Court of the United States

OCTOBER TERM, 1991

BETH ANN GOODWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether there was sufficient evidence, apart from petitioner's immunized testimony, to establish probable cause to believe that the property at issue in this forfeiture action was purchased with proceeds of illegal drug transactions.

2. Whether forfeiture proceedings under 21 U.S.C. 881, which are conducted in accordance with "[t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws," are subject to the statute of limitations for forfeitures under the customs laws, 19 U.S.C. 1621.

3. Whether this forfeiture proceeding is subject to dismissal on the ground that the government unduly delayed the filing of the action.

4. Whether, in view of the lower courts' determination that there is probable cause to believe that the real estate at issue is subject to forfeiture, petitioner is entitled to dismissal of this forfeiture proceeding on the ground that she did not receive a hearing before the property was seized.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, In re, 861 F.2d 307 (1st Cir. 1988)	13
Boyd v. *United States*, 116 U.S. 616 (1886)	8
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)	15
Department of Law Enforcement v. *Real Property*, Nos. 77,308-77,312 (Fla. Aug. 15, 1991)	15-16
Fisher v. *United States*, 425 U.S. 391 (1976)	8
Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949)	8
In re Grand Jury Investigation, 657 F.2d 88 (6th Cir. 1981)	8
In re Grand Jury Proceedings, 835 F.2d 375 (1st Cir. 1987)	8
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	16
One 1958 Plymouth Sedan v. *Pennsylvania*, 380 U.S. 693 (1965)	8
Sgro v. *United States*, 287 U.S. 206 (1932)	13
The Brazil, 134 F.2d 929 (7th Cir. 1943)	11
United States v. *A Single Family Residence*, 803 F.2d 625 (11th Cir. 1986)	15
United States v. *Bush*, 647 F.2d 357 (3d Cir. 1981)	13
United States v. *Doe*, 465 U.S. 605 (1984)	8
United States v. *$8,850 in United States Currency*, 461 U.S. 555 (1983)	14
United States v. *Kemp*, 690 F.2d 397 (4th Cir. 1982)	12

Cases—Continued: Page

United States v. *Kubrick*, 444 U.S. 111 (1979) 12
United States v. *Neal*, 500 F.2d 305 (10th Cir. 1974) 13
United States v. *One 1977 Lincoln Mark V. Coupe*, 643 F.2d 154 (3d Cir.), cert. denied, 454 U.S. 818 (1981) 13
United States v. *141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991) 16
United States v. *14128 South School Street*, 774 F. Supp. 475 (N.D. Ill. 1991) 16
United States v. *One 1978 Mercedes Benz*, 711 F.2d 1297 (5th Cir. 1983) 12
United States v. *Pappas*, 613 F.2d 324 (1st Cir. 1979) 12
United States v. *Riverbend Farms, Inc.*, 847 F.2d 553 (9th Cir. 1988) 8
United States v. *Spetz*, 721 F.2d 1457 (9th Cir. 1983) 13
United States v. *The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2d Cir. 1989) 15
United States v. *United States Coin & Currency*, 401 U.S. 715 (1971) 8
United States v. *Valdes*, 876 F.2d 1554 (11th Cir. 1989) 12

Constitution, statutes and rule:

U.S. Const.:
Amend. V 7, 8
Due Process Clause 3, 14, 15
Amend. VI 14
19 U.S.C. 1619 ..... 10, 11
19 U.S.C. 1621 ..... 4, 6, 9, 10, 11, 12
21 U.S.C. 801-904 10
21 U.S.C. 836 11
21 U.S.C. 881 ..... 4, 5, 6, 9, 11
21 U.S.C. 881(a) 12
21 U.S.C. 881(a)(6) 2, 7
21 U.S.C. 881(b) 13

Statutes and rule—Continued: Page

21 U.S.C. 881(b)(4) 12, 13
21 U.S.C. 881(d) 4, 6, 9, 10, 11
21 U.S.C. 881(d) (1978) 10
28 U.S.C. 1292 4
28 U.S.C. 2462 ..... 3, 4, 9, 11
46 U.S.C. App. 836 11

Miscellaneous:

1 D. Smith, *Prosecution and Defense of Forfeiture Cases* (1991) 11
S. Rep. No. 173, 96th Cong. 1st Sess. (1979) 11

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1052

BETH ANN GOODWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (91-781 Pet. App. 1a-16a) is reported at 937 F.2d 98.[1] The opinions of the district court denying respondent Goodwin's motion for summary judgment (91-781 Pet. App. 17a-35a) and certifying certain questions for interlocutory appeal (91-781 Pet. App. 38a-45a) are reported, respectively, at 738 F. Supp. 854 and 742 F. Supp. 189.

---

[1] The instant petition is a cross-petition filed in response to our petition in No. 91-781. Citations to "91-781 Pet. App." are to the appendix to that petition. Citations to "Cross-Pet. App." are to the appendix to the cross-petition.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1991. A petition for rehearing was denied on August 13, 1991 (91-781 Pet. App. 46a-47a). The petition for a writ of certiorari in No. 91-781 was filed on November 12, 1991 (a Tuesday after a Monday holiday), and was received by petitioner on November 15, 1991. This cross-petition was filed on December 16, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The facts of this case are set forth in detail in our petition in No. 91-781. Briefly, the government seeks forfeiture of real estate in Rumson, New Jersey, under 21 U.S.C. 881(a)(6). The government alleged —and both lower courts found probable cause to believe—that the property was purchased with funds that petitioner's companion, Joseph Brenna, derived from illegal drug transactions. Based upon the government's verified complaint, the district court issued a warrant authorizing the seizure of the property. Notwithstanding the seizure, petitioner has remained in possession of the property pursuant to an occupancy/tenant agreement with the Marshals Service. C.A. App. 54a-55a, 656a-663a.

In the district court, petitioner filed motions to dismiss and for summary judgment. Petitioner contended (1) that she was an "innocent owner" of the property within the meaning of Section 881(a)(6); (2) that the seizure of the property was unlawful because it had not been preceded by notice and a hearing; (3) that the forfeiture complaint was based on testimony that petitioner had given under a grant of use immunity; and (4) that the action was barred

by the applicable statute of limitations (in petitioner's view, 28 U.S.C. 2462) or by undue delay.

The district court denied the motions. 91-781 Pet. App. 17a-35a. The court's disposition of petitioner's first contention, which is the subject of our petition in No. 91-781, is described in that petition. The district court found it unnecessary to determine whether the Due Process Clause requires a hearing before real property is seized. The court noted that "[v]arious circuit courts have held that the illegal seizure of property, standing alone, will not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding." *Id.* at 19a. Consequently, the court continued, an unconstitutional seizure "provides no basis for dismissing an action where the government demonstrates entitlement to forfeiture based upon permissible evidence." *Ibid.* In this case, it found, "the government has established, by permissible evidence, that probable cause exists to subject the premises to forfeiture." *Id.* at 20a. See 91-781 Pet. 4-6 (summarizing the evidence underlying that determination).

The district court rejected, on similar grounds, petitioner's contention that the forfeiture complaint was improperly based on her immunized testimony. The court concluded that "[t]he government has adequately demonstrated, from other sources independent of [petitioner's] testimony, that probable cause exists to support forfeiture of the premises." 91-781 Pet. App. 30a.

The court found that any delay between the criminal acts underlying the forfeiture and the institution of forfeiture proceedings did not warrant dismissal of the action. The court acknowledged that "[d]ue process concerns are implicated where there is a delay

between the seizure of the property and the post-seizure filing of a judicial forfeiture action." 91-781 Pet. App. 31a. But in this case, it continued, "there has been no real deprivation * * *, because [petitioner] has been permitted to continue to reside at the premises under an arrangement with the government," and petitioner "was afforded the opportunity to contest the forfeiture and engage in discovery shortly after the seizure." *Id.* at 32a. The court also concluded that the action had been commenced within the period prescribed by 19 U.S.C. 1621, rejecting petitioner's contention that 28 U.S.C. 2462 governs forfeiture proceedings under 21 U.S.C. 881.[2]

The district court certified four questions for interlocutory appeal pursuant to 28 U.S.C. 1292. The questions relevant to the cross-petition were (91-781 Pet. App. 44a-45a):

---

[2] Section 881(d) provides that "[t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof." The statute of limitations for forfeiture proceedings under the customs laws, 19 U.S.C. 1621, provides that such a proceeding must be commenced "within five years after the time when the alleged offense was discovered."

Petitioner advocated application of the residual statute of limitations set forth in 28 U.S.C. 2462. Section 2462 provides that "[e]xcept as otherwise provided by Act of Congress," an action for "the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," must be commenced "within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

> (1) Whether the seizure of [petitioner's] home was unconstitutional because there was no pre-seizure hearing and, if so, whether the forfeiture proceedings involving said home should be dismissed as a result; * * *
>
> (3) Whether the verified complaint in this action was based, in part, upon immunized testimony and if so, whether the forfeiture proceedings must be dismissed as a result; and
>
> (4) Whether the government's claims in this action are barred by the applicable statute of limitations and/or undue delay.

2. The court of appeals affirmed on the questions at issue on the cross-petition. The court found that the absence of pre-seizure notice and a hearing could not justify dismissal of the action. Although the initial "seizure of [petitioner's] home * * * may have been unlawful," the court explained, "the unlawfulness of the seizure does not require dismissal of the forfeiture proceedings provided that probable cause to seize the premises can be supported by untainted evidence." 91-781 Pet. App. 5a. The panel upheld the district court's determination that the government had made the requisite showing in this case. *Id.* at 6a.

The court of appeals also rejected petitioner's contention that use of her immunized testimony required dismissal of the action. The court noted that the DEA agent who had verified the forfeiture complaint "relied * * *, in part," on testimony petitioner had given under a grant of use immunity, and it "assume[d], without deciding, that a civil forfeiture effected under section 881 constitutes a 'criminal case' under the immunity statute, 18 U.S.C. § 6002." 91-781 Pet. App. 10a & n.3. Nevertheless, the court of appeals continued, "[b]ased upon the informa-

tion cited by the district court which was garnered independently of [petitioner's] testimony, the district court correctly concluded that probable cause existed for the forfeiture of the property." *Id.* at 14a.

Finally, the court of appeals held that the action was not barred by the statute of limitations or by undue delay. Relying upon 21 U.S.C. 881(d), which makes statutory provisions relating to forfeitures under the customs laws applicable to proceedings under Section 881, the court found that the applicable statute of limitations is 19 U.S.C. 1621. See note 2, *supra*. Section 1621 requires that an action for a forfeiture be commenced "within five years after the time when the alleged offense was discovered." The court of appeals concluded that "because the government became aware of the transactions giving rise to this action in 1986 and because the government instituted this forfeiture action within five years (1989), the statute of limitations does not bar this action." 91-781 Pet. App. 15a. The court found no support for petitioner's contention that undue delay in the filing of a forfeiture action preceding a seizure—as opposed to delay between a seizure and a subsequent forfeiture action—warrants dismissal of the action. Like the district court, the panel concluded that petitioner was "permitted to be heard 'at a meaningful time after the deprivation of the property' " and was not "wholly deprived of her property since she has been permitted to continue to reside at the premises." *Id.* at 15a-16a.[3]

---

[3] The court also held that petitioner could assert an innocent owner defense and remanded for further proceedings to determine if petitioner was in fact an innocent owner. 91-781 Pet. App. 6a-9a. Our petition in No. 91-781 seeks further review of that issue.

ARGUMENT

Petitioner does not dispute our showing that the question presented by our petition in No. 91-781—whether a person may assert the innocent owner defense recognized by 21 U.S.C. 881(a)(6) on the basis of an interest in property that has been acquired only after title to the property has vested in the United States—is worthy of further review. The issues raised by the cross-petition, by contrast, do not call for this Court's attention. As both lower courts recognized, it is unnecessary to reach two of those issues—whether the Fifth Amendment prohibits the use of immunized testimony in a civil forfeiture proceeding and whether real property may be seized without a prior hearing. There is no conflict among the circuits or any other consideration supporting further review of petitioner's claims that the action was commenced after the expiration of the statute of limitations or was unduly delayed. Finally, contrary to petitioner's contention, the issues raised by the cross-petition are not intertwined with the question presented by our petition. We submit, accordingly, that the petition in No. 91-781 should be granted and that the cross-petition should be denied.

1. Petitioner contends that this action should be dismissed because the government has relied on immunized testimony in pursuing this action. Pet. 8-10. The court of appeals assumed for purposes of argument that the Fifth Amendment privilege against compelled self-incrimination was applicable to this proceeding, but held that there was sufficient evidence, apart from petitioner's testimony, to establish probable cause. 91-781 Pet. App. 10a-14a & n.3. That conclusion was fully justified, and it does not warrant further review in this Court.

The Fifth Amendment protects against compelled self-incrimination "in any criminal case." In *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), this Court stated that, for purposes of the Fifth Amendment privilege, "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." [4] "Several of *Boyd*'s express or implicit declarations have not stood the test of time," *Fisher* v. *United States*, 425 U.S. 391, 407 (1976), and this Court has cautioned against giving them "full scope," *United States* v. *Ward*, 448 U.S. 242, 253 (1980).

Whether or not the Fifth Amendment privilege is available to petitioner in this proceeding, however, both lower courts found that evidence derived from sources independent of petitioner's immunized testimony is sufficient to establish probable cause to believe that the property in question was purchased with drug proceeds. 91-781 Pet. App. 14a, 30a. Thus, both held, any reliance that the government may have placed on immunized testimony would not justify dismissal of the action. This determination, which rests on a factual finding concurred in by both lower courts, presents no question calling for this Court's review. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

There is no merit to petitioner's attack on the lower courts' dispositive factual finding. Her only

---

[4] See also *United States* v. *United States Coin & Currency*, 401 U.S. 715, 718 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965); *United States* v. *Riverbend Farms, Inc.*, 847 F.2d 553, 559 (9th Cir. 1988); *In re Grand Jury Proceedings*, 835 F.2d 375 (1st Cir. 1987); *In re Grand Jury Investigation*, 657 F.2d 88, 91 (6th Cir. 1981).

specific contention is that her "admission that she received money from Brenna provided circumstantial evidence presumably utilized to further the investigation that led to the Brenna indictment" and that reliance on the indictment in this case thus violated her privilege against self-incrimination. Pet. 9 & n.2. Before petitioner gave her testimony under immunity, however, the government had already learned of the source of the funds used to buy the house from Shaun Murphy (the Virgin Islands accountant who actually wired the money to New Jersey). See 91-781 Pet. 5-6; Gov't C.A. Br. 7. Petitioner's own filings in this case, which are not covered by any grant of immunity, assert that "Mr. Brenna made a gift of the initial funds used for the down payment on the * * * property to [petitioner]." Cross-Pet. App. 15a. Thus, it is unnecessary to rely on petitioner's immunized testimony to establish the source of the funds used to buy the property at issue. There is no dispute that petitioner's testimony provided no information regarding Brenna's drug transactions. Thus, the use of the indictment to establish probable cause to believe that his funds were derived from drug dealing entails no possible misuse of immunized testimony.

2. Petitioner contends (Pet. 11-13) that this action is subject to the residual statute of limitations set forth in 28 U.S.C. 2462, rather than the statute prescribed for forfeitures under the customs laws, 19 U.S.C. 1621, and that the action was filed outside the period prescribed by the former statute.

To our knowledge, this is the first case to decide which statute of limitations is applicable to forfeitures under 21 U.S.C. 881. As the court of appeals held, the plain language of Section 881(d) compels the conclusion that 19 U.S.C. 1621 applies. Section

881(d) states that "[t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter [21 U.S.C. 801-904] * * *." The statute of limitations for customs forfeitures, 19 U.S.C. 1621, is plainly a "provision[] of law relating to the * * * judicial forfeiture, and condemnation of property for violation of the customs laws."

Petitioner's argument is based on the notion that each word or phrase in Section 881(d) corresponds to a discrete provision of the customs laws and that Section 1621 is not among the referenced provisions.[5] Neither the text nor the legislative history provides any support for that view.[6] Nor does petitioner ex-

---

[5] The bracketed citations in petitioner's quotation of Section 881(d) are petitioner's invention; nothing comparable appears in the statute itself. See Pet. 11-12.

[6] As the result of a 1979 amendment to the statute, Section 881(d) does not incorporate provisions of the customs laws providing for payments to informants. See 19 U.S.C. 1619. Contrary to petitioner's contention (Pet. 12), however, that exception to Section 881(d) has no bearing on the applicable statute of limitations.

Prior to the 1979 amendment, Section 881(d) incorporated "[a]ll provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims *and the award of compensation to informers in respect of such forfeitures* * * *." 21 U.S.C. 881(d) (1976) (emphasis added). The amendment changed "[a]ll provisions" to "[t]he provisions" and deleted the highlighted phrase. The obvious intention of the amendment, confirmed by its legislative history

plain why, if Congress intended only to incorporate selectively from the customs laws, it failed to make that intention clear by means of specific citations to those provisions it wished to borrow. Section 881(d)'s broad, inclusive language fully justifies the lower court's conclusion that Congress intended no such limitation on the applicability of the customs laws to forfeitures under Section 881.[7]

By its terms, 28 U.S.C. 2462 applies only when Congress has not supplied a statute of limitations for a particular class of cases—*i.e.*, "[e]xcept as otherwise provided by Act of Congress." Moreover, even if this statute were applicable to forfeitures under Section 881, it would produce the same result as 19 U.S.C. 1621.[8] Petitioner's contention that this case

---

(see S. Rep. No. 173, 96th Cong., 1st Sess. 36-37 (1979)), was to render inapplicable the provision of the customs laws providing for payments to informers, 19 U.S.C. 1619. The amendment did not affect Section 881(d)'s incorporation of the customs laws' statute of limitations; both before and after that change, Section 881(d) was plainly broad enough to encompass 19 U.S.C. 1621.

[7] The language of Section 881(d) is no less inclusive than that of 46 U.S.C. App. 836, the statute at issue in *The Brazil*, 134 F.2d 929 (7th Cir. 1943). Section 836 provides that forfeitures under the Shipping Act "may be prosecuted in the same court, and may be disposed of in the same manner, as forfeitures incurred for offenses against the law relating to the collection of duties." *The Brazil* held that this language incorporated Section 1621, the statute of limitations at issue here.

[8] See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 12.02, at 12-47 to 12-48 (1991). The five-year period prescribed by Section 2462 begins to run, with an exception not relevant here, on "the date when the claim first accrued"; as Smith notes, "[t]he general rule for the accrual of federal claims is that 'the statute of limitations begins to run when a plaintiff knows or should know' " of the facts giving rise to

was filed beyond the period of limitations does not warrant further review.

3. As noted, the property at issue was seized, pursuant to a warrant issued by the district court upon a finding of probable cause, after this action was filed. C.A. App. 67a-71a. Petitioner contends that the delay—which she characterizes as "undue"— between the time that the government had information supporting a forfeiture and the commencement of this action warrants dismissal of this action. Pet. 13-17. The lower courts correctly rejected that contention, and none of the authorities on which petitioner relies supports her position.

In *United States* v. *Pappas*, 613 F.2d 324, 330 (1979) (en banc), the First Circuit held that 21 U.S.C. 881(b)(4) authorized a *warrantless* seizure of property "only when the seizure immediately follows the occurrence that gives the federal agents probable cause to believe that the [property] is subject to forfeiture under section 881(a) *and* the exigencies of the surrounding circumstances make the requirement of obtaining process unreasonable or unnecessary." That interpretation of Section 881(b)(4), which other courts have rejected,[9] is inapposite to this

---

the claim. *Ibid.*; cf. *United States* v. *Kubrick*, 444 U.S. 111 (1979) (cause of action for medical malpractice under the Federal Tort Claims Act accrues when the plaintiff was aware of his injury and its cause). That standard is substantially the same as the standard prescribed by 19 U.S.C. 1621, which allows five years "after the time when the alleged offense was discovered."

[9] See *United States* v. *Valdes*, 876 F.2d 1554, 1557-1558 & nn.8-9 (11th Cir. 1989); *United States* v. *One 1978 Mercedes Benz*, 711 F.2d 1297, 1302 (5th Cir. 1983); *United States* v. *Kemp*, 690 F.2d 397, 402 (4th Cir. 1982); *United States* v.

case. Here, the government did not rely on Section 881(b)(4); it obtained a warrant.[10] As the First Circuit has made clear, nothing in *Pappas* suggests that the government must initiate a forfeiture action or seek a warrant within some period after it obtains probable cause to believe that property is subject to forfeiture.[11]

The remaining authorities on which petitioner relies are just as far afield. *Sgro* v. *United States*, 287 U.S. 206 (1932), and *United States* v. *Neal*, 500 F.2d 305 (10th Cir. 1974), involved claims that the information used to procure search warrants had become stale—*i.e.*, that the facts used to show probable cause could have changed during the period prior

---

Bush, 647 F.2d 357, 368-369 (3d Cir. 1981); *United States* v. *One 1977 Lincoln Mark V. Coupe*, 643 F.2d 154, 157-158 (3d Cir.), cert. denied, 454 U.S. 818 (1981). See also *United States* v. *Spetz*, 721 F.2d 1457, 1469-1470 (9th Cir. 1983). The First Circuit itself has recognized that *Pappas* "has been considerably beleaguered" and might be subject to reconsideration. *In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 311 n.4 (1988).

[10] Section 881(b) authorizes the government to seize property subject to forfeiture in five different ways: (1) upon process issued by a district court, following commencement of a forfeiture action against the property; (2) pursuant to an arrest or a search authorized by a warrant; (3) pursuant to a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding; (4) without a warrant, upon a showing of probable cause to believe that the property is dangerous to public health or safety; and (5) without a warrant, upon a showing of probable cause that the property is subject to civil forfeiture. *Pappas* involved the last of these alternatives; in this case, the government obtained a warrant following the institution of a forfeiture action.

[11] See *In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d at 311-312.

to the issuance of a warrant. The seizure of the property at issue here is subject to no similar objection. The essence of the government's claim is that the property was purchased with proceeds of narcotics transactions. A showing of probable cause to that effect, unlike a showing that evidence of a crime will be found at a particular place, does not lose any of its force with the passage of time.

In *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983), this Court rejected a contention that the government had violated the requirement of due process by delaying judicial forfeiture proceedings, but made clear that such claims should be determined with reference to the same factors used to decide whether criminal defendants have received the speedy trial guaranteed by the Sixth Amendment. In this case, judicial forfeiture proceedings were commenced *before* any seizure occurred. By the time petitioner was deprived of any interest in her property, there was a pending judicial proceeding in which she was able to obtain an adversary ruling on the existence of probable cause to support the seizure. There is no conflict between the court of appeals' decision here and *$8,850 in United States Currency*, nor is there any other consideration supporting this Court's review.

4. Finally, petitioner seeks further review of her contention that the Due Process Clause requires a hearing before a home is seized for civil forfeiture. Pet. 17-20. Although the courts of appeals have expressed differing conclusions with regard to this question, all agree that any defect in the procedure by which property is seized does not immunize the property from forfeiture. In this case, both lower courts

have determined that there is probable cause to believe that the relevant property was purchased with drug proceeds. Thus, whether or not petitioner should have received a hearing prior to the seizure of the house, she is not now entitled to any relief in this action.

In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-680 (1974), this Court held that the Due Process Clause did not require notice and a hearing before a yacht on which marijuana was discovered was seized for forfeiture. The Court cited three considerations justifying postponement of notice and hearing: (1) the fact that seizure served important governmental purposes, allowing courts to assert *in rem* jurisdiction over the property and thereby to enforce the drug statutes, (2) the fact that the yacht might otherwise be moved to another jurisdiction or concealed, and (3) the fact that the seizure was effected by governmental authorities, rather than self-interested private parties.

In *United States* v. *A Single Family Residence*, 803 F.2d 625, 632 (1986), the Eleventh Circuit held that the reasoning of *Calero-Toledo* could fairly be extended to real property even though it is less movable than personal property. By contrast, the Second Circuit has ruled that the magnitude of a claimant's interest in a house and the absence of exigent circumstances in typical seizures of real property alter the balance of interests material to the requirement of procedural due process and mandate a pre-seizure hearing. *United States* v. *The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1262-1266 (1989).[12] In this case, the court of appeals

---

[12] The Supreme Court of Florida has reached a similar conclusion with respect to that State's forfeiture statute. *Depart-*

observed in dicta that "[i]n keeping with the analysis used in *South Livonia*, * * * the government's seizure of [petitioner's] home pursuant to section 881 without notice and a hearing may have been unlawful." 91-871 Pet. App. 5a.

Whatever the merits of *South Livonia*'s constitutional analysis may be, it is clear that the absence of a pre-seizure hearing does not entitle petitioner to any relief. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984), this Court recognized that a defect in the seizure of property subject to forfeiture does not justify dismissal of forfeiture proceedings. In keeping with that principle, *South Livonia* itself refused to reverse a forfeiture on the basis of its determination that the real property in question should not have been seized without a prior hearing. Citing several cases, the Second Circuit explained that "the illegal seizure of property, standing alone, will not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding." 889 F.2d at 1265. The court of appeals applied the same reasoning here, finding that the evidence of record at this juncture "suffice[s] to establish" probable cause. 91-781 Pet. App. 5a. It is unnecessary—and would thus be inappropriate—to consider in this case whether the Constitution requires

---

ment of Law Enforcement v. *Real Property*, Nos. 77,308-77,312 (Aug. 15, 1991). See also *United States* v. *141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990) (authorizing seizure for forfeiture of an apartment building pursuant to an *ex parte* warrant based upon probable cause and distinguishing *South Livonia*), cert. denied, 111 S. Ct. 1017 (1991); *United States* v. *14128 South School Street*, 774 F. Supp. 475, 479 (N.D. Ill. 1991) (collecting decisions by federal district courts).

notice and a hearing before real property purchased with drug proceeds is seized for forfeiture.[13]

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

JANUARY 1992

[13] Petitioner also contends that the verified complaint in this action was insufficient to establish probable cause. Pet. 20-23. That question was not among the issues certified for interlocutory appeal, see 91-781 Pet. App. 4a; the court of appeals did not consider it; and it is moot in view of the lower court's concurrent finding that the present record establishes probable cause.

☆ U. S. GOVERNMENT PRINTING OFFICE 1992 312324 45235